FILE COPY

Petition not printed

Office - Supreme Court, U. S.
FILED
SEP 26 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No brief for resp. on merits

No. 17

HENRY HAWK,

Petitioner,

vs.

NEIL OLSON, WARDEN, ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

JOSEPH A. FANELLI,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions involved	4
Statement	4
I. The application for habeas corpus	5
II. The proceeding upon the application for habeas corpus	16
Specification of errors to be urged	18
Summary of argument	19
Argument	21
A. Petitioner is entitled to a hearing upon his allegations that in his trial and conviction he was not accorded due process	21
I. Petitioner is entitled to be heard upon his allegations that he was forced into trial for a capital offense with such expedition as to deprive him of the effective assistance of counsel	22
II. Petitioner is entitled to be heard upon his allegations that his conviction was obtained by perjured testimony knowingly used by the prosecution	40
B. Petitioner is entitled to a hearing upon his allegations that in his trial and conviction he was denied equal protection of the laws of Nebraska	46
I. Petitioner is entitled to be heard upon his allegations that he was deprived of the appeal accorded to others by the laws of Nebraska	46
II. Petitioner is entitled to be heard upon his allegations that he was denied the equal protection of the laws in being brought by Nebraska officials into Nebraska and incarcerated without regard to the law of Nebraska	49
Conclusion	51

CITATIONS

Cases:

	Page
Adams v. *U. S. ex rel. McCann*, 317 U. S. 269	26,32,33,39
In Re Ah Fong, Fed. Cas. No. 102 (C. C. D. Cal.)	48
Alexander v. *O'Grady*, 137 Neb. 645, cert. den. 311 U. S. 682	35
Ashcraft v. *State of Tennessee*, 322 U. S. 143	25
Azzolin v. *United States*, 2 F. (2d) 15 (C. C. A. 8th)	33
Barber v. *United States*, 142 F. (2d) 805 (C. C. A. 4th), cert. den. 322 U. S. 741	23
Barbier v. *Connolly*, 113 U. S. 27	48
Barnes v. *State*, 124 Neb. 826	30
Batchelor v. *State*, 189 Ind. 69	33,37,38
Beebe v. *Sanford*, 138 F. (2d) 412 (C. C. A. 5th)	38
Betts v. *Brady*, 316 U. S. 455	15,24,35
In Re Betts, 36 Neb. 282	36
Boche v. *State*, 84 Neb. 845	28
Bourne v. *State*, 116 Neb. 141	28
Boyd v. *O'Grady*, 121 F. (2d) 146 (C. C. A. 8th)	45
Boykin v. *Huff*, 121 F. (2d) 865 (App. D. C.)	37,38
Brown v. *Mississippi*, 297 U. S. 278	37,42
Bryant v. *Zimmerman*, 278 U. S. 63	44
The People ex rel. Burgess agt. Risley, 66 How. Pr. (N. Y.) 67	33
Carlsen v. *State*, 129 Neb. 84	44,45
In Re Application of Carper, Tesar v. *Bowley*, 144 Neb. 623	35
Cochran v. *Kansas*, 316 U. S. 255	40,47
Cockeram v. *State*, 121 Neb. 757	30
In Re Application of Cole, 103 Neb. 802	28
Commonwealth v. *O'Keefe*, 298 Pa. 169	26,33
Cooke v. *Swope*, 109 F. (2d) 955 (C. C. A. 9th)	37
Cooke v. *United States*, 267 U. S. 517	33
Cooper v. *State*, 120 Neb. 598	33
Cornell v. *State*, 138 Neb. 708; reh. 139 id. 878	29,32
Crain v. *United States*, 162 U. S. 625	24
Davis v. *O'Grady*, 137 Neb. 708, cert. den. 311 U. S. 682.	35
Davis v. *State*, 51 Neb. 301	28
Davis v. *State*, 116 Neb. 90	28
Denison v. *State*, 117 Neb. 601	28

Page

Dutiel v. *State*, 135 Neb. 811 27
Dyson v. *State*, 107 Neb. 774 30,32
Ex Parte Eads, 17 Neb. 145 27
Edwards v. *United States*, 139 F. (2d) 365 (App. D. C.), cert. den. 312 U. S. 769 35
Eyer v. *Brady*, 128 F. (2d) 1012 (C. C. A. 4th), cert. den. 317 U. S. 679 38
Foster v. *State*, 83 Neb. 264 23
Garland v. *Washington*, 233 U. S. 642 24
Gilmore v. *United States*, 129 F. (2d) 199 (C. C. A. 10th), cert. den. 317 U. S. 631 24,38
Glasser v. *United States*, 315 U. S. 60 32,33,52
Goemann v. *State*, 94 Neb. 582 32
Grosjean v. *American Press Co.*, 297 U. S. 233 37
Haddix v. *State*, 76 Neb. 369 28
Hans Nielsen, Petitioner, 131 U. S. 176 34
Havlicek v. *State*, 101 Neb. 782 28
In Re Havlik, 45 Neb. 747 36
Ex Parte Hawk, 321 U. S. 114 14,15,16,17,19,20,21
Ex Parte Henry Hawk, 318 U. S. 746 15
Hawk v. *O'Grady*, 137 Neb. 639, cert. den. 311 U. S. 645 14
Hawk v. *Olson*, 130 F. (2d) 910 (C. C. A. 8th), cert. den. 317 U. S. 697 14,15
Hoctor v. *State*, 141 Neb. 329 23
Holiday v. *Johnston*, 313 U. S. 342 32,40
Holmgren v. *United States*, 217 U. S. 509 32
House v. *Mayo*, 324 U. S. 42 22,24,33,37,41
Hubbard v. *State*, 65 Neb. 805 36
Ex Parte Hull, 312 U. S. 546 38
Hunt v. *State*, 143 Neb. 871 23,28
Hysler v. *Florida*, 315 U. S. 411 47
Jahnke v. *State*, 68 Neb. 154; 181 23,27,30
Johnson v. *Zerbst*, 304 U. S. 458 34,38
Jones v. *Commonwealth*, 269 Ky. 779 45
Jones v. *Commonwealth of Kentucky*, 97 F. (2d) 335 (C. C. A. 6th) 33,37
Kendall v. *Aleshire*, 28 Neb. 707 50
Ker v. *Illinois*, 119 U. S. 436 50
Knothe v. *State*, 115 Neb. 119 27

Page

Koch v. *State*, 130 Neb. 119 30,32
Kraus v. *State*, 102 Neb. 690 28
Kuwitzky v. *O'Grady*, 135 Neb. 466 36
Ex Parte Lange, 18 Wall. 163 48
Leeper v. *Texas*, 139 U. S. 462 48
Lindley v. *State*, 117 Neb. 597 28
Louie Yung v. *Colman*, 5 F. Supp. 702 (S. D. Idaho) 24
Lovejoy v. *State*, 130 Neb. 154 30,32
Luster v. *State*, 142 Neb. 253 32
Lutz v. *Ragen*, 324 U. S. 760; 65 Sup. Ct. 978 40
Lyons v. *Oklahoma*, 322 U. S. 596 39
In Re Application of Maher, North v. *Dorrance*, 144 Neb. 484 36
Mahon v. *Justice*, 127 U. S. 700 50
Marshall v. *State*, 116 Neb. 45 32
Michaelson v. *Beemer*, 72 Neb. 761 36
Millslagle v. *State*, 137 Neb. 664; 138 id. 778 30
Mitchell v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th) 28,32
Mooney v. *Hollohan*, 294 U. S. 103 16,40
Moore v. *Dempsey*, 261 U. S. 86 52
Moore v. *Missouri*, 159 U. S. 673 48
Murray v. *State*, 119 Neb. 16 23,27
Neiden v. *State*, 120 Neb. 619 32
Nelson v. *State*, 33 Neb. 528 48
Neufield v. *United States*, 118 F. (2d) 375 (App. D. C.), cert. den. 315 U. S. 798 35
Newcomb v. *State*, 129 Neb. 69 45
Palko v. *Connecticut*, 302 U. S. 319 33
Pettibone v. *Nichols*, 203 U. S. 192 50
Potter v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th) 33,45
Powell v. *Alabama*, 287 U. S. 45 15,19,24,26,31,32,33
Pyle v. *Kansas*, 317 U. S. 213 9,40
Reid v. *Adehold*, 65 F. (2d) 110 (C. C. A. 5th), cert. den. 290 U. S. 676 24
Reid v. *Sanford*, 42 F. Supp. 300 (N. D. Ga.) 24
In Re Resler, 115 Neb. 335 36
Rice v. *Olson*, 324 U. S. 786; 65 Sup. Ct. 989 32
In Re Robinson, 29 Neb. 135 50
Robinson v. *Johnston*, 50 F. Supp. 774 (N. D. Cal.) 34,38
Rogers v. *Alabama*, 192 U. S. 226 40,43

	Page
Ruzicka v. *State*, 137 Neb. 473	30
Ex Parte Sharp, 33 F. Supp. 464 (D. C. Kans.)	33,38
Smith v. *O'Grady*, 312 U. S. 329	15,32,34,36
Smith v. *State*, 21 Neb. 552	27
Smith v. *State*, 123 Neb. 17	33
Snyder v. *Massachusetts*, 291 U. S. 97	33
Stagemeyer v. *State*, 133 Neb. 9	38
State v. *Guerringer*, 265 Mo. 408	47
State v. *Robertson*, 55 Neb. 41	27,38
In Re Application of Tail, Tail v. *Olson*, 144 Neb. 820.	35
Tompkins v. *Missouri*, 323 U. S. 485	20,24,25,29,32
Ughbanks v. *Armstrong*, 208 U. S. 481	48
United States v. *Masaaki Kuwabara*, 56 F. Supp. 716 (S. D. Cal.)	38
Voight v. *Webb*, 47 F. Supp. 743 (E. D. Wash.)	37
Waley v. *Johnston*, 316 U. S. 101	39
Walker v. *Johnston*, 312 U. S. 275	20,39,41
Walleck v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th)	33,38
White v. *Ragen*, 324 U. S. 760; 65 Sup. Ct. 978	22,32,37
Whitner v. *State*, 46 Neb. 144	24
Wiedeman v. *State*, 141 Neb. 597	48
Williams v. *Kaiser*, 323 U. S. 471	20,24,29,32,34
Wood v. *United States*, 128 F. (2d) 265 (App. D. C.)	23
Zink v. *State*, 34 Neb. 37	23

Miscellaneous:

U. S. Const., Art. IV, Sec. 2	50
Judicial Code, Sec. 237(b)	2
Comp. Stats. Neb. (1929):	
Secs. 28-401-403	28
Sec. 29-1803	26
Sec. 29-2101	32
Sec. 29-2102	
Sec. 20-2008	45
Rev. Stats. Neb. (1943), Sec. 25-2008	45
Note, 19 Neb. Law Bull. 150	45

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 17

HENRY HAWK,

Petitioner,

vs.

NEIL OLSON, WARDEN, ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court of Lancaster County, Nebraska, is set forth in the record (R. 37-40). The opinion of the Supreme Court of Nebraska (R. 46-51) is reported in 145 Neb. —, 16 N. W. (2d) 181.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on November 3, 1944 (R. 45). The petition for a writ of certiorari was filed on January 9, 1945, and granted on April 23, 1945 (R. 52). An order granting petitioner

leave to proceed *in forma pauperis* was entered on April 23, 1945 (R. 52). The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Petitioner was charged with first degree murder. He is poor and ignorant. He first got public counsel, at the very earliest and then in rather loose fashion, at 11 o'clock of the night before his arraignment and trial. He was arraigned the following morning at nine. Upon the arraignment followed an immediate trial. The trial endured three days. The death penalty was avoided, but a sentence for life was imposed. It was entered four days after petitioner was brought into the State of Nebraska to answer to the charge of first degree murder. The first question presented is whether petitioner's application for *habeas corpus* which sets forth the foregoing facts, together with allegations stating that public counsel did not begin to act in the case until the jury was partially or completely selected, is sufficient to entitle petitioner to a hearing upon the contention that he was forced into trial for a capital offense with such expedition as to deprive him of the effective assistance of counsel in violation of the Fourteenth Amendment to the Constitution.

2. Whether petitioner's application for *habeas corpus* which alleges in supporting detail and *in haec verba* that his conviction "was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" is sufficient to entitle him to a hearing upon the contention that in this respect, too, he was deprived of the fair trial guaranteed him by the Fourteenth Amendment. Subsidiary to this question is an incidental question of whether the Court below disposed of petitioner's perjury contention upon an adequate state ground.

3. Immediately after his conviction for first degree murder in Nebraska, petitioner was returned to the Federal Penitentiary at Leavenworth, Kansas, to continue his confinement under an earlier federal conviction. He was deserted by counsel. Proceeding without counsel, he filed a timely notice of appeal in the trial court, and asked leave to proceed as a pauper, which was granted. The trial court ordered its clerk and court reporter to prepare and deliver to petitioner a Transcript of Proceedings and a Bill of Exceptions so that he might prosecute his appeal. But for some reason best known to the trial court and prosecuting officials these appeal documents were impounded and "consealed" (sic) and never delivered to petitioner. Time for appeal expired as petitions to the Supreme Court of Nebraska for an extension of time and for mandamus to the trial court for production of the appeal documents failed. Some nine months later advice was received from the court reporter that the County Attorney (prosecuting official at the trial) had the Bill of Exceptions "in his file". The third question presented is whether petitioner's application for *habeas corpus* which sets forth the foregoing facts is sufficient to entitle him to a hearing upon the contention that he was deprived of the appeal provided by the statutes of Nebraska in violation of the "equal protection" clause of the Fourteenth Amendment.

4. Petitioner against his will was, upon parole from the federal penitentiary at Alcatraz, forcibly seized in California and conveyed to Nebraska by Nebraska officials and kept imprisoned in Nebraska without regard to the governing law of that State. The fourth question presented is whether petitioner's application for *habeas corpus* which alleges the foregoing facts is sufficient to entitle petitioner to a hearing upon the contention that in this respect, too, he was deprived, in violation of the Four-

teenth Amendment, of the equal protection of the law of Nebraska. That law, in our view, accords to others similarly situated the right to release on *habeas corpus* in like circumstances.

Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

> "* * * nor shall any State deprive any person of life, [or] liberty * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner, Henry Hawk, began this proceeding on March 10, 1944 by filing in the District Court of Lancaster County, Nebraska, a petition for a writ of *habeas corpus* directed against respondent, warden of the Nebraska State Penitentiary located in that county (R. 1). Petitioner was then serving his seventh year of a sentence for life imposed upon a Nebraska conviction for murder in the first degree. Imprisonment in respondent's custody has continued under that sentence (R. 2; 12; 15). The petition based in the Fourteenth Amendment sought a hearing upon allegations of violations of that Amendment in petitioner's commitment, trial, conviction, and imprisonment (R. 15). Attached to the petition as an exhibit (R. 15-32) is a copy of a certified transcript of the record of the murder trial. The petition makes frequent reference to that transcript as it does also, at times by page number, to certified transcripts of the testimony taken at such trial and the preliminary hearing which preceded it. These documents are not attached to the petition. However, they are set forth in the records of the Court as Exhibits A and C to petitioner's motion for leave to file a petition for *habeas corpus* in *Ex*

Parte Henry Hawk, No. —— original, Oct. Term 1942, 318 U. S. 746; and, in view of respondent's charge (Respondent's Brief "In Resistance," p. 17) that petitioner "is withholding this evidence from the court" we invite reading of all of the official record and will in summarizing the petition give additional record references for its allegations to the transcripts of testimony taken at the trial and preliminary hearing. Where there are slight variations, natural in the working of a human memory, between the petition and the official record, we follow the record in the text and give petitioner's allegation in the margin. So proceeding, and reordering Henry Hawk's allegations so as to make coherent the discursive and ungrammatical statements of an ignorant layman, we come then to the pertinent facts he alleged.

I. The Application for Habeas Corpus

Petitioner was on February 11, 1936 a federal prisoner at Leavenworth, Kansas. On that day he was brought by federal officers before a Nebraska magistrate in Omaha, Nebraska, where at 2 PM of the same day there ensued a preliminary hearing upon a complaint of first degree murder while attempting to rob (R. 2; P. H. 1).[1]

At the preliminary hearing, the County Attorney and Deputy County Attorney represented the State (P. H. 1). No one represented petitioner (R. 2; P. H. 1 ff.). Not inconsistently with the official record which shows no counsel for petitioner, he alleges that the magistrate "deprived your Petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your Petitioner to proceed without the assistance of counsel or other defense" (R. 2).

[1] "P. H." references are to pages of the transcript of the preliminary hearing. "T." references will be used to designate pages of the transcript of the testimony at the murder trial.

Petitioner claimed at the preliminary hearing that he was not guilty of the offense charged in the complaint (R. 2; P. H. 1).[2]

The State called three witnesses. Their names were De Santi, Nowicki and Taylor. The newspapers had reported the shooting of one Perelman, a grocer, in the course of a robbery on February 28, 1934. De Santi, a tavern-keeper, testified that he saw petitioner at De Santi's place of business talking with Nowicki and Taylor before the time of the shooting, and that later during the night he saw each of the three again at his place of business (R. 6; P. H. 2-11). Nowicki testified that petitioner and Taylor wanted to borrow a gun from him, which he did procure for them, and that he drove petitioner and Taylor to the vicinity of Perelman's store and waited for their return from the project of holding up Perelman (R. 7; P. H. 12-23).

Taylor admitted he shot Perelman while trying to rob him in a joint enterprise conceived and guided by Nowicki. But he denied that petitioner was involved in any way. The State proceeded to impeach him by use of an alleged prior statement by Taylor that Hawk was involved (R. 7-8; P. H. 24-47).

The State rested (P. H. 47). Petitioner, representing himself, called one witness for the defense, Captain Franks of the Omaha Police Force. He was questioned by the County Attorney, but not by petitioner. He testified that Taylor had made the prior contradictory statement implicating petitioner (P. H. 48-49).[3]

Petitioner appears to allege that the State called one additional witness at the preliminary hearing, a Dr. C. J.

---

[2] Petitioner, a layman who could not be expected to know any better, calls this an "arraignment." However, in Nebraska the arraignment on a murder charge is the procedure for taking the plea to an information or indictment so charging, which in this case came later.

[3] Later at the jury trial, Captain Franks testified for the State (R. 8, T. 172).

Toohey. He testified, according to petitioner (R. 5), that Perelman, wounded by a bullet, had died. The official record shows no such witness. Whether there was or was not such a witness is of some importance in connection with the facts alleged on the perjury branch of the case. We give those facts below in appropriate order.

We note here that apart from just such a witness there was no evidence at all at the preliminary hearing that anyone had died.

The magistrate found "reasonable evidence" to bind petitioner over to the District Court on a charge of first degree murder. Petitioner was then returned to Leavenworth, Kansas, in the evening of the day of his arrival in Omaha, Nebraska (R. 3).

Six days later on February 17th, an information consisting of two counts in first degree murder was filed against petitioner in the District Court (R. 16).[4] The record shows no service of the information upon petitioner at any time (R. 16-18).

On March 15, 1936, petitioner, still at the Leavenworth Penitentiary and still uninformed of the filing of an information against him, was again brought by federal officers to Omaha "at about 4:15 PM" and placed in solitary confinement in an isolated cell of the County Jail. He was held incommunicado. The county public defender and his assistant called upon him after eleven that night. Their conversation lasted fifteen minutes. It consisted of persua-

[4] We follow the official record on this. Petitioner alleges specifically that after the order of bind over he was at 4 PM of the day of his preliminary hearing (which began at 2 PM) arraigned "in the Trial Court" to an information for first degree murder. He entered a plea of not guilty. That was on February 11th. The record shows that the information was not filed until February 17th. The petitioner, who has no clear idea of just what an arraignment is (cf. fn. 2, p. 6, *supra*), is apparently confused on this point. We follow the record and do not charge that Nebraska forced petitioner to plead to an information a few moments after preliminary hearing.

sion from the public defender to plead guilty to murdering Perelman, and the persistent refusal of petitioner to do so because, as he says, he "had exhonerated himself at the Preliminary beraing" (sic). At the end of fifteen minutes, the public defender and assistant public defender left with the statement that they "would have nothing to do with Petitioner's trial scheduled for trial the following morning" (R. 3-4).[5]

The following morning at nine, petitioner, a pauper and ignorant layman, stood trial for his life (R. 4; 18; 29; 30; 34). Brought into court in the custody of two federal officers, he appeared without counsel (R. 4; 19; T. 5). The information was read to him. The Trial Court asked for his plea. He pleaded "Not Guilty"; and forthwith moved orally for a continuance of at least twenty-four hours for the purpose of consulting counsel, examining the charge then communicated to him for the first time, summoning witnesses, and preparing a defense (R. 4). The motion was immediately denied by the Trial Court "upon full consideration" (R. 18; 4).

The Clerk began to impanel the trial jury. Petitioner alleges that after two or three jurymen had been called the public defender and his assistant entered the case in his behalf without having had any consultation with him (R. 4). The record shows their appearance as having occurred after the selection and swearing in of a complete jury (T. 5).

The trial continued at once (R. 4; 19; T. 5-6). The State called eighteen witnesses (R. 5-8; T. 1). All of the State's witnesses who were at the scene or in the vicinity of the crime at the very time of the crime or within a few moments

[5] Petitioner specifically alleges that these events occurred on the night before his trial. He dates that night as March 16th, but is continuously one day off in his chronology for the trial began March 16 (R. 18-19), and the night before the trial when the public defender called on him was March 15th.

thereafter, denied seeing petitioner or failed to testify on the point. (R. 5; T. 20; T. 31; 32-37; 37-42; 45; 50; 57; 63; 68; 70). The total of such witnesses for the State was ten.

The State through De Santi, the tavern keeper, Taylor, the man who admittedly shot Perelman, and Nowicki, his accomplice, introduced evidence, which, if believed, tended to prove that De Santi had lent or sold a gun to Nowicki; Nowicki had given it to Taylor; and Taylor had it at the time of the crime. (R. 6; 7-8; T. 76; 138; 112). A Dr. McCleneghan testified for the State that he had removed a bullet from Perelman, personally marked "S" by him, which in his opinion caused Perelman's death (R. 5-6; T. 23). McDonald, a ballistics expert, testified that the bullet, marked "S" by Dr. McCleneghan, came from the De Santi-Nowicki-Taylor gun (R. 6; T. 106). An incidental witness, Bruning, was used by the State to introduce a plat of the scene of the crime (R. 5; T. 8).

Thus far, there was no evidence implicating petitioner. De Santi, departing from his testimony at the preliminary hearing, testified that at various times he had seen Taylor, Nowicki, and petitioner at his tavern before the crime; but that he had not seen them talking together; and that finally he did not recall seeing petitioner at his tavern after the crime although he did see Taylor and Nowicki (R. 6; T. 72-85). Over defense objection, the State impeached De Santi by showing his testimony at the preliminary hearing to the effect that he had seen the three men before and after the crime (R. 6; T. 85 ff.).

Taylor, called again by the State, persisted in the testimony he had given at the preliminary hearing. Again, he testified that Hawk was not involved (R. 7-8; T. 136; 141; 142; 146; 148; 150). Without defense objection, the State was permitted to impeach Taylor, who was no surprise, by showing prior extrajudicial contradictory statements made

to police officers. The impeachment process was lengthy and added the testimony of two police officers (R. 7-8; T. 152-161; 169-171; 172-179). The jury's consideration of the impeachment evidence was in no way limited.

Thus far, there was no *competent* evidence implicating Hawk. Finally, Nowicki, the accomplice, alone implicated Hawk (R. 7; T. 107-133). There were no other witnesses to corroborate his story.

The State rested (R. 8; T. 179).

There was no motion for a directed verdict of acquittal (R. 19; T. 180).

The information showed petitioner, Henry Hawk, as using two aliases, "Henry Hawks" and "Charles Henry" (R. 16). The defense called one witness. A federal deputy marshal, he gave evidence directed to showing that petitioner did not use aliases (R. 8; T. 180-182).

The defense rested (R. 9; T. 182).

The trial court charged the jury (R. 20-25). There was no instruction on the lesser degrees of homicide. There was no instruction guiding the use by the jury of the evidence of Nowicki, the accomplice. There was no instruction withdrawing from the substantive consideration of the jury the extrajudicial statements of De Santi and Taylor. No such instructions were requested in behalf of the defense. The trial court volunteered none.

Everything went to the jury on the question of innocence or guilt—the evidence given at the trial and the statements allegedly made out of court by De Santi, and particularly, Taylor. (R. 20-25; R. 6; T. 85 ff.; R. 7-8; T. 152-161; 169-171; 172-179).

On March 18th—some evidence was heard; argument to the jury was had; the jury was instructed; the jury retired; the jury returned with a verdict of guilty; and the defense filed a motion for a new trial. (R. 25-27). The motion for a

new trial—it covers a full half-page of the printed record (R. 27)—stated broadly, simply, and only the following:

"Motion for New Trial

"Comes now the defendant and moves the Court to grant a new trial in the above entitled case for the following reasons:

"1. Errors of law occur-ing at the trial.

"2. Errors of facts occur-ing at the trial.

"3. Newly discovered evidence which the defendant exercising ordinary diligence was unable to produce at the trial.

"4. That the judgment is contrary to the evidence.

"5. Irregularity on the part of the witnesses for the State.

"6. Irregularity on the part of the County Attorneys for the State.

"Henry Hawks, By Joseph Lovely, His Attorney, John N. Baldwin."

On March 19th—the motion for a new trial was overruled, the court "being fully advised in the premises" (R. 28); petitioner was sentenced to life imprisonment (R. 28); petitioner was returned to Leavenworth, Kansas, to complete his federal sentence first (R. 10; 28).

The difference between the night petitioner arrived in Omaha to stand trial and the day he was returned to Leavenworth was only four days, plus the loss of liberty for life (R. 3; 18; 28).

Throughout the period from jury selection to conviction petitioner was represented by the county public defender and his assistant. Their names were Joseph Lovely and John N. Baldwin. There was scant time for consultation. And petitioner apparently alleges that at no time did such counsel consult with him "regarding his defense" (R. 4).

But thereafter such counsel as he had deserted petitioner. Proceeding without counsel, petitioner filed a timely

notice of appeal in the trial court. He alleged but two grounds for reversal: (1) that the jury "was bias—and prejudiced" (sic); and (2) that the court erred in the admission of "certain evidence" as "appears by the transcript". Leave to proceed as a pauper was requested and granted. The trial court ordered its clerk and court reporter to prepare and deliver to petitioner a Transcript of Proceedings and a Bill of Exceptions so that he might prosecute his appeal. "But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and consealed (sic) and never delivered to your Petitioner." Time for appeal expired as petitions to the Supreme Court of Nebraska for an extension of time and for mandamus upon the trial court to compel production of the appeal documents failed. Some nine months later advice was received from the court reporter that the County Attorney (prosecuting official at the trial) had the bill of exceptions "in his file" (R. 10-11; 30-31).

Following his conviction for murder, petitioner was transferred from the federal penitentiary at Leavenworth to the federal penitentiary at Alcatraz Island, California (R. 10). There, on November 27, 1937, while in the act of leaving Alcatraz "on Parole to officials of Nebraska", petitioner was seized by Nebraska officials, placed in irons, and transported by such officials to the state penitentiary in Lancaster County, Nebraska, without authority of law and against petitioner's will and consent. There petitioner has remained ever since pursuant to the Nebraska sentence of life imprisonment (R. 12).

Petitioner protests his innocence (R. 12). He states that innocence would have been proven, had time been granted for the proof (R. 12). He alleges specifically that Taylor before the trial "was threatened and told by the prosecuting officials he would never live to get out of the penitentiary, if he didn't take the stand and swear that Henry Hawk shot

Isadore Perelman during the attempted robbery" (R. 8). In his ignorance, petitioner fails to understand the process of impeachment and hence charges intimidation of Taylor while on the stand; but it will be recalled that the sworn statement of Taylor implicating petitioner which was made to the prosecuting officials outside of court did go to the jury on the question of petitioner's innocence; and petitioner, reasonably interpreted, fairly charges that in that statement Taylor, under intimidation, was a perjurer (R. 7-8). The perjury of Nowicki, who did testify in court against petitioner, is flatly charged (R. 7). Petitioner appears to allege (R. 7) that Nowicki's bribed perjury will be proven, if he is granted a hearing, by the "subpoeaning" of witnesses and evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska. In one particular, petitioner offers the Clerk of the federal district court as a prospective witness to disprove Nowicki's claim of acquaintance with petitioner for the period Nowicki claimed (R. 9). In further detail, petitioner claims the prosecution knew the testimony of Dr. McCleneghan, the coroner's county physician, was perjured (R. 5). McCleneghan testified as an essential part of the proof of *corpus delicti* at the trial that after the death of Perelman he removed a bullet from the body of Perelman lying at the morgue; personally marked that bullet with the letter "S"; and that the same bullet marked "S" which he identified on the stand caused the death of Perelman. Petitioner charges that the bullet marked "S" was removed by a Dr. C. J. Toohey, hospital physician, before the death of Perelman, and that Dr. Toohey so testified at the preliminary hearing, although the transcript of that hearing fails to include his testimony. (R. 5; T. 21-24; P. H. "Index"). Broadly, petitioner alleges "that your petitioner's Trial and Conviction was (sic) obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" (R. 15). This allegation, he

states, "is supported by the evidence of fact as more fully appears upon the record to be presented on day of hearing and by testimony of witnesses to be given at the hearing" (R. 15).

Finally, petitioner "has by petition continually complained to this Court and every court in the land as to the illegal manner in which he has been convicted, kidnaped (sic) and committed to the Nebraska State Penitentiary" (R. 12). The half-forgotten details of that effort, so far as they can be gleaned and collated from various judicial records and reports, are recounted here. For that nine year effort, futile thus far in obtaining the opportunity to be heard on facts alleged, is the matrix in which this proceeding is now imbedded.

Apparently as early as 1938, at least two petitions for *habeas corpus* had been filed with and denied by the Supreme Court of Nebraska. See p. 7 of Respondent's Brief in Opposition in *Hawk* v. *Olson*, 130 F. (2) 910, cert. den. 317 U. S. 697. Henry Hawk filed his third petition in the District Court of Lancaster County. He raised only the question whether his Nebraska sentence violated Nebraska law in postponing punishment thereunder to await completion of a federal sentence. Denial of that petition without hearing was affirmed by the Supreme Court of Nebraska. *Hawk* v. *O'Grady*, 137 Neb. 639. Presumably because no federal question was presented, this Court denied certiorari. 311 U. S. 645. (R. 38; and see *Ex Parte Hawk*, 321 U. S. 114, 115). A fourth petition filed in the District Court of Lancaster County was dismissed without hearing. R. 38-39; and see *Hawk* v. *Olson*, 130 F. (2d) 910 at p. 910.

Henry Hawk, still acting *pro se*, filed his fifth petition in the federal district court "alleging matters not previously brought to the attention of the State Courts". See *Ex Parte Hawk*, 321 U. S. 114, 115. Dismissal of the

petition without hearing was affirmed on the ground of failure to exhaust state remedies. *Hawk* v. *Olson*, 130 F. (2d) 910 (C. C. A. 8th, 1942). This court denied certiorari. 317 U. S. 697.

Petitioner returned to the state courts. An original application for *habeas corpus*, in substance the same as his application here, was denied by the Supreme Court of Nebraska without opinion. See *Ex Parte Hawk*, 321 U. S. 114, 115.

Petitioner tried another opening that seemed to appear in the shifting fog before him. Henry Hawk, still with no one but himself for counsel, presented his present contentions in an original petition to this Court. Leave to file was denied "but without prejudice to presentation of the matters alleged to the U. S. District Court". See *Ex Parte Hawk*, 321 U. S. 114, 115; *Ex Parte Henry Hawk*, 318 U. S. 746.

Accordingly, petition to the federal district court was renewed, and a like petition was filed with the Senior Circuit Judge of the Eighth Circuit. Both petitions were denied. Leave to appeal to the Circuit Court of Appeals for the Eighth Circuit was denied by the Senior Circuit Judge. See *Ex Parte Hawk*, 321 U. S. 114, 115.

So Henry Hawk, *pro se*, returned to this Court. In his second original application, he asked leave to file a petition for *habeas corpus*, identical in substance to the petition presented in this proceeding. The Court stated in paraphrase of petitioner's allegations that "the state court forced him into trial for a capital offense • • • with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment." In support of the granting of a hearing on those allegations, the Court cited *Powell* v. *Alabama*, 287 U. S. 45; *Smith* v. *O'Grady*, 312 U. S. 329; and (on a cf. citation) *Betts* v. *Brady*, 316

U. S. 455. So too, the Court stated petitioner's allegation that "his conviction was based in part on the introduction at the trial of evidence known by the prosecution to be perjured"; and again the Court cited, in support of a hearing on those allegations, too, the case of *Mooney*, 294 U. S. 103. Finally, this Court concluded:

> "From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, *Walker* v. *Johnston*, 312 U. S. 275, 284-7; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101, 104-5; *Cochran* v. *Kansas*, 316 U. S. 255, 258."

Finding that state remedies had not been exhausted and that therefore petitioner was "not at this time entitled to relief in a federal court", the Court denied the motion for leave to file without prejudice to the procedure indicated in its opinion. See *Ex Parte Hawk*, 321 U. S. 114, 115-116, 118.

Accordingly, petitioner, pursuant to the procedure so indicated, filed his present application—it was his eleventh (approximately)—in the District Court of Lancaster County, and requested the hearing he had yet to obtain (R. 15). This is what happened:

II. The Proceedings Upon the Application for Habeas Corpus

The application was dismissed without return and without hearing "for want of merit and for failure to state a cause of action" (R. 37-38). The District Court of Lancaster County noted that it had "fully and carefully examined" the application, and further that it had made "an examination" of its own records (R. 38). The petition—it is only fifteen pages long—makes four different references to the supporting opinion of this Court in *Ex*

Parte Hawk, 321 U. S. 114 (R. 1; 10; 14; 15; 15; and see, too, R. 34). The District Court of Lancaster County fails to note it (see its opinion, R. 37-40). That court did note however that dismissal of an earlier petition filed in the same court by petitioner was affirmed by the Supreme Court of Nebraska, 137 Neb. 639, with certiorari denied by this Court, 311 U. S. 645 (R. 38). It found that the issues presented in the present application were on that earlier petition "heretofore fully and finally adjudicated" (R. 38). The earlier petition raised and was disposed of solely on the question of the validity under Nebraska law of the postponement of punishment under petitioner's Nebraska sentence. (See p. 14, *supra*.)

On appeal, the Supreme Court of Nebraska could find no error in the District Court's disposition of the application, and affirmed the judgment below (R. 51). It passed upon the merits of petitioner's allegations concerning deprivation of the effective assistance of counsel, and found "there is no merit to petitioner's contention" (R. 51). Like the opinion of the District Court, the opinion of the Supreme Court makes no mention of the Court's opinion in *Ex Parte Hawk*, 321 U. S. 114. It passed upon the merits of petitioner's allegations as to perjury, and likewise found no merit in them. In addition, the court stated that the writ of error *coram nobis* would be the proper remedy for a meritorious case concerning perjury (R. 49). Petitioner's allegations concerning the deprivation of an appeal were passed upon on the merits (R. 50). Here the court gave a rationale:

> "* * * Petitioner says these [the appeal documents] were impounded and concealed and never delivered to him, but he fails to state in what manner they were impounded and concealed. The bill of exceptions was subsequently found in the office files of the county attorney of Douglas county. No petition

> in error was ever filed in the supreme court. He alleges he was deserted by his counsel. However, the petitioner fails to show that he ever requested the public defender or his assistant to appeal. * * *"

Without discussion, the court passed upon and rejected petitioner's contentions based on his allegations of denial of equal protection in being brought to Nebraska and imprisoned in violation of Nebraska law.

Petitioner requested a writ of certiorari. Respondent stated in opposition that "no federal question is involved", and concluded (Brief "In Resistance", p. 27):

> "It is apparent that this petition is another of the numerous, meritless applications made by the petitioner for the sole purpose of harassing the courts and law enforcement officials. To sustain petitioner will be making the writ of habeas corpus an instrument of oppression instead of an instrument of liberty. The application for a writ of certiorari should be denied."

The Court granted certiorari (R. 52).

Specification of Errors to Be Urged

We urge that the court below erred in failing:

1. To hold that petitioner was entitled to be heard in proof of his allegations that he was forced into trial for a capital offense with such expedition as to deprive him of the effective assistance of counsel in violation of the Fourteenth Amendment.

2. To hold that petitioner was entitled to be heard in proof of his allegations that his conviction was obtained by perjured testimony knowingly used by the prosecution in violation of the Fourteenth Amendment.

3. To hold that petitioner was entitled to be heard in proof of his allegations that he was deprived of an appeal

from his conviction in violation of the "equal protection" clause of the Fourteenth Amendment.

4. To hold that petitioner was entitled to be heard in proof of his allegations that he was illegally and forcibly brought into Nebraska and imprisoned in violation of the "equal protection" clause of the Fourteenth Amendment.

5. To reverse the judgment of the District Court of Lancaster County dismissing the petition for *habeas corpus*.

Summary of Argument

A. DUE PROCESS

I. *Deprivation of the Effective Assistance of Counsel.*—An ignorant pauper on trial for his life in a complicated proceeding faced arraignment alone. Public counsel began to defend him after commencement of the trial. Conviction for life was the result—five days after he was brought into the jurisdiction. Such are the facts disclosed by the official record of the proceedings that convicted your petitioner. On those facts, there is no question of the right of petitioner to an effective appointment of counsel. On those facts, in our view, there is no substantial question that petitioner was deprived of that right; for counsel had no time to investigate the facts in petitioner's behalf; no opportunity to protect petitioner's pre-trial rights; and no breathing space to prepare on legal questions of crucial importance in the trial. In reason, there was in these circumstances no opportunity for petitioner to be heard in his defense. And the precedents so hold. *Powell* v. *Alabama*, 287 U. S. 45, among the several controlling precedents, was basically this case. Hence, as the Court has indicated in *Ex Parte Hawk*, 321 U. S. 114, petitioner is entitled to be heard in proof of his contention that he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel.

II. *Perjury.*—Petitioner alleges that his conviction was obtained by perjured evidence knowingly used by the prosecution. In addition, he alleges the supporting details of that complaint. So much, certainly, suffices to entitle him to be heard in proof. Indeed, less would do. *Pyle* v. *Kansas*, 317 U. S. 213; *Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485; *Walker* v. *Johnston*, 312 U. S. 275. Hence, the Court should persist in the view, indicated in *Ex Parte Hawk*, 321 U. S. 114, which grants to petitioner the opportunity to be heard in proof of his contention that perjury procured by the prosecution sent him to the penitentiary for life.

B. EQUAL PROTECTION

I. *Deprivation of Appeal Rights.*—Agents of the State of Nebraska impounded and concealed petitioner's appeal documents thus depriving him of the right, generally accorded to all in Nebraska, to appeal from a conviction. So petitioner alleges. If it be true, violation of the Fourteenth Amendment by invidious denial of an appeal is plain. Hence, petitioner must be heard in proof, *Cochran* v. *Kansas*, 316 U. S. 255, and other authorities cited.

II. *Discriminatory Treatment of Petitioner in Bringing Him into Nebraska and Keeping Him Imprisoned without regard to the General Law of Nebraska.*—As is its right, Nebraska has adopted its own rule governing treatment of the prosecution or imprisonment of a man brought into the state without extradition process. The Nebraska rule grants release to one, otherwise lawfully imprisoned, who is brought into the state without extradition process. That rule of general applicability was ignored in the particular case of petitioner who alleges that he was brought into Nebraska without extradition and nevertheless kept continuously imprisoned. Such invidious treatment, if it

occurred, was, on the authorities, a denial of equal protection. Hence, petitioner is entitled to be heard in proof of his *prima facie* case of denial of equal protection.

We submit for all of the foregoing reasons that the judgment of the Court below should be reversed and the case remanded for hearing on all four of the foregoing contentions.

Argument

We make two contentions as to due process, and two as to equal protection. First we contend under the due process clause that petitioner is entitled to a hearing upon (1) his allegations of deprivation of the effective assistance of counsel in a capital case; and (2) his allegations that perjured testimony knowingly used by the prosecution obtained his conviction. Second as to equal protection we contend that petitioner is entitled to be heard upon (1) his allegations that he was deprived of an appeal from a conviction of first degree murder; and (2) his allegations that he was illegally and forcibly brought into Nebraska and incarcerated without regard to Nebraska law applicable to others similarly situated.

A. PETITIONER IS ENTITLED TO A HEARING UPON HIS ALLEGATIONS THAT IN HIS TRIAL AND CONVICTION HE WAS NOT ACCORDED DUE PROCESS.

The Court has already indicated, if not held, that petitioners allegations entitle him to a hearing upon both of his due process contentions, first that "the state court forced him into trial for a capital offense * * * with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause," and second, that "his conviction was based in part on the introduction at the trial of evidence known by the prosecution to be perjured." See *Ex Parte Hawk*, 321 U. S. 114,

115-116. We have quoted from the Court's opinion in *Ex Parte Hawk* which thus summarizes the allegations of an original petition for *habeas corpus* filed by petitioner which was in substance the same as the petition here. The *per curiam* opinion in *Ex Parte Hawk* cites decisions of the Court supporting petitioner's right to be heard and concludes:

> "From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, *Walker* v. *Johnston*, 312 U. S. 275, 284-7; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101, 104-5; *Cochran* v. *Kansas*, 316 U. S. 255, 258." [6]

Ex Parte Hawk has since been cited by the Court as a holding in relation to the point of deprivation of the effective assistance of counsel. See *House* v. *Mayo*, 324 U. S. 42, 45; *White* v. *Ragen*, 324 U. S. 760, ; 65 Sup. Ct. 978, 980.

Whether *Ex Parte Hawk* be dictum or holding, paramount here is the fact that public conscience and settled law compel persistence in the view there expressed.

I. *Petitioner is Entitled to be Heard upon his Allegations that he was forced into Trial for a Capital Offense with such Expedition as to Deprive him of the Effective Assistance of Counsel.*

Petitioner, a pauper and ignorant layman, was conveyed one day from the federal penitentiary at Leavenworth, Kansas, to Omaha, Nebraska. There, on that day, he was the defendant in a preliminary hearing before a local magistrate upon a charge of murder in the first degree (R. 2; P. H. 1). The hearing, according to the official record,

[6] The negative cast of this language is probably due to the fact that the Court was denying leave to file an original petition and at the same time suggesting its filing in a state court whose action was not then under review.

developed no evidence that anyone had died (pp. 6-7, *supra*); but petitioner was, nevertheless, bound over for prosecution on a murder charge (P. H. 50). On that day, he was returned to Leavenworth (R. 3). He was in custody at all times. He had no counsel and was forced to represent himself throughout the preliminary hearing (R. 2). We pass over the nice question whether those facts alone comprised a substantial denial of due process. See *Wood* v. *United States*, 128 F. (2d) 265 (App. D. C.); and *cf. Barber* v. *United States*, 142 F. (2d) 805 (C. C. A. 4th), cert. den. 322 U. S. 741.

By ancient statute and settled judicial decisions in Nebraska, it is the right of a defendant in a felony case to have one day between service of an information upon him and arraignment upon the information served. The right is held to be a substantial one enabling the defendant to ascertain the precise nature of the information against him before pleading thereto. *Zink* v. *State*, 34 Neb. 37; *Foster* v. *State*, 83 Neb. 264; *Hoctor* v. *State*, 141 Neb. 329. The right is generally accorded to all, and exceptional violations of the right result in reversals of convictions. *Zink* v. *State, supra; Hoctor* v. *State, supra*, at p. 333. It was not accorded to Henry Hawk. Without counsel and without one day for counsel to prepare, he was forced upon immediate arraignment to plead to the merits of an information, served on no one and read to him then for the first time (R. 4; 16-18). Petitioner's plea of not guilty did not obviate prejudice to him; it prejudiced his defense. The plea to the merits waived all matters proper for pleas in abatement and to quash. *Hunt* v. *State*, 143 Neb. 871; *Lindley* v. *State*, 117 Neb. 597. Such matters waived included the loss of valuable rights to question whether there was a fatal lack of evidence of murder at the preliminary hearing (see *Jahnke* v. *State*, 68 Neb. 154; 181; *Murray* v. *State*, 119 Neb. 16); to track down variances between complaint

and information necessitating quashing of the information (see *Whither* v. *State*, 46 Neb. 144); and to attack defects in the information (see *Hunt* v. *State, supra*). Pertinent decisions of this Court point strongly to a denial of equal protection here, if not of due process. See Part B, *infra*, pp. 46 to 51; and *cf. Crain* v. *United States*, 162 U. S. 265; *Garland* v. *Washington*, 232 U. S. 642. But this we pass over.

Public counsel for the defense in petitioner's trial for murder "had no consultation whatsoever" with petitioner regarding his defense (R. 4). This, it seems, was rather plainly a denial of due process. Such is the trend of a line of majority decisions of the Court. *Powell* v. *Alabama*, 287 U. S. 45, 49, 56, 59, 73; *Tompkins* v. *Missouri*, 323 U. S. 485, 488; *House* v. *Mayo*, 324 U. S. 42, 45; *The People ex rel. Burgess* agt. *Risley*, 66 How. Pr. (N. Y.) 67; *Louie Yung* v. *Colman*, 5 F. Supp. 702 (S. D. Idaho). And this, too, we pass over.[7]

We are content to adopt the most restrictive of the various approaches to the problem here which are indicated in opinions of the Court. We restrict the inquiry to "an appraisal of the totality of facts" surrounding the question of counsel in petitioner's trial. See *Betts*

[7] We put aside the fact that public counsel deserted petitioner upon his appeal from a sentence of life imprisonment (R. 10). Petitioner had to proceed alone, and lost his appeal rights (R. 19). The underlying concept of fairness which has guided application of the due process clause with ever-increasing emphasis upon common decency in an advancing civilization has yet to be firmly applied to the area of rights to counsel in criminal appeals. But see *Reid* v. *Aderhold*, 65 F. (2d) 110 (C. C. A. 5th), cert. den. 290 U. S. 676, which finds in 1933 no rights to counsel on appeal; and *Reid* v. *Sanford*, 42 F. Supp. 300 (N. D. Ga.) which finds in 1941 rights to counsel on appeal equivalent to those at trial. Tangential lines of reasoning in other opinions appear (but darkly) to lean in the direction of recognizing here what common decency, in our view, requires. See *Williams* v. *Kaiser*, 323 U. S. 471, 477, *Gilmore* v. *United States*, 129 F. (2d) 199, 203 (C. C. A. 10th), cert. den. 317 U. S. 631.

v. *Brady*, 316 U. S. 455, 462; *Ashcraft* v. *State of Tennessee*, 322 U. S. 143, 158 (dissenting opinion complaining of abolition of "the totality of facts" rule in a field cognate to the present question). So proceeding, we believe decision in petitioner's favor still to be so plainly required by the facts that it is unnecessary to decide the four points we have pretermitted.

Henry Hawk was brought to Omaha the day before his arraignment and trial for a capital offense (R. 3-4). He was without counsel, without funds and without learning.[8] The county public defender called upon petitioner the night before the trial, and began acting as his counsel at

---

[8] His age and the locality of his home and friends do not appear. The record strongly indicates that petitioner's home was not in Omaha (R. 6; 9). On this point, which is of no substantial significance in the glare of the many highlights of this case, counsel tenders the information received by mail from petitioner that his home is St. Joseph, Missouri. The transcript of the conviction proceeding shows that petitioner was without counsel until after arraignment and the commencement of trial (R. 18; cf. R. 4). That he was indigent is certain; and as to this there is no issue. See Brief for Respondent (Appellee) filed in the court below, at p. 41, which brief is in the record here but not printed. Petitioner refers to himself as having been of the class of "poor, defens-less (sic) and ignorant litigants" (R. 34). Cf. *Tompkins* v. *Missouri*, 323 U. S. 485, 487. The public defender appeared for petitioner on the ground, required by statute, that petitioner "had not the ability to procure counsel". Comp. Stats. Neb. (1929) Sec. 29-1803. Shortly after his conviction, petitioner filed a poverty affidavit, and was permitted by the trial court to proceed upon his appeal *in forma pauperis* (R. 29-30). Finally as to his ignorance—it is deep-dyed and the record here shows its tincture on practically every page (see pp. 5 to 18, *supra*). Again, he refers to himself as one of a class of "ignorant litigants" (R. 34). There seems to be a sort of perverse pride in the man that keeps him from flatly stating that he is ignorant. In the nine years of his futile effort to get a judicial hearing which have followed upon his conviction, he has acquired an acquaintance with legal terms. The acquaintance has led to little fundamental understanding of the meaning of those terms. (Reread his petition for *habeas corpus*, and his petition for certiorari and brief in support thereof). Actually, petitioner informs counsel by mail that his education extends through two grades of elementary school in Maryville, Missouri, plus two years in the third grade without passing.

the trial the following morning at some time after arraignment and commencement of the trial (R. 4; 18).[9]

Gone was the opportunity for the time and facilities for investigation and the production of evidence that an accused must have.[10] Since public counsel were precipitated into the case, we cannot assume that there was no defense.[11] *Powell* v. *Alabama*, 287 U. S. 45, 58; *Commonwealth* v. *O'Keefe*, 298 Pa. 169. To the contrary, had there been time, there was much factual investigation, likely to be fruitful, for the public defender to do.

Ten witnesses for the State who were in the neighborhood of the crime failed to identify petitioner (p. 8, *supra*). Apparently, the neighborhood was a crowded, poor one. Some digging—there was a life at stake—might have found neighbors who saw only one man running from the shooting and joining but one other man in the getaway car (necessarily Taylor and Nowicki, thus excluding petitioner). At least one witness for the State who was specifically questioned on the point so testified. His name was Joseph Dargaczewski (T. 64-68). And it may be noted further that prospective witnesses for the State named John Wieczorek, James Farrascio and James John were not called. The names of prospective State witnesses

---

[9] The county public defender is an elected official. His salary is $3600 per annum. His duties are: (1) to defend indigent persons in all felony cases; (2) to prosecute wage and other demands of impecunious persons believed to be meritorious, but not cases exceeding $100; and (3) to defend impecunious persons in all civil actions in which such persons are harassed unjustly. By specific statutory provision, the public defender, here, being in a county of over one hundred and sixty thousand inhabitants, has an assistant ($150 per month) and stenographer ($100 per month) to help him. Comp. Stats. Neb. (1929) Secs. 29-1803-4.

[10] "An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence." *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279.

[11] That is, no defense other than the fact that Henry Hawk did not use the name "Henry Hawks" etc.

were endorsed on the information. They included one, Ben Barone, De Santi's partner, who was working beside De Santi, the tavern keeper, on the night of the shooting (R. 18; T. 109-110; P. H. 8). He, too, was not called. There was no time to interview the State's witnesses, assuming that there was time to find out who they were by reading the endorsement of names on the information. There was no time to ferret out witnesses for the defense.[12]

Gone was the opportunity for public counsel to explore valuable rights of the defense to pre-trial procedures. If counsel had had the time, study of the transcript of preliminary hearing would have shown the lack of evidence of any death. Before arraignment, a petition for *habeas corpus* would have tested the sufficiency of the evidence at the preliminary hearing to show that a murder was committed, and that the defendant probably committed it. *Jahnke* v. *State*, 68 Neb. 154, 161; 181; *State* v. *Robertson*, 55 Neb. 41, 45. A motion to quash or plea in abatement, just which is not clear, would have raised at least the question whether there was *some* evidence of murder at the preliminary hearing. *Jahnke* v. *State*, *supra*; *Murray* v. *State*, 119 Neb. 16; *Whitner* v. *State*, 46 Neb. 144. The information against Henry Hawk (R. 16-17) defies grammatical analysis. There was no one to scrutinize it, to search out its defects, to choose the vehicle of plea in abatement or motion to quash, and to urge the points found. Cf. *Ex Parte Eads*, 17 Neb. 145; *Smith* v. *State*, 21 Neb. 552, 556; *Dutiel* v. *State*, 135 Neb. 811; *Knothe* v. *State*, 115 Neb. 119. Henry Hawk, without counsel to assist him, pleaded to the merits of the information. These pre-trial

---

[12] Taylor's testimony, for example, indicated three witnesses who could testify that petitioner was not with him when he committed the crime. Admittedly, it would have been difficult, and maybe it would have been impossible, to locate these witnesses (T. 147; 165). But the point is that with a man's life in the balance there was no time for the attempt.

rights were thus in large part waived *Hunt* v. *State*, 143 Neb. 871; *Lindley* v. *State*, 117 Neb. 597; *Havlicek* v. *State*, 101 Neb. 782.

Gone, too, was the opportunity for public counsel to prepare the law of the case. Cf. *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th). There are three degrees of homicide in Nebraska—murder in the first degree punishable by death or life imprisonment; murder in the second degree punishable by not less than ten years of imprisonment; and manslaughter punishable by not more than ten nor less than one year of imprisonment. Comp. Stats. Neb. (1929) Secs. 28-401-403. Upon an information for murder in the first degree, conviction for manslaughter or murder in the second degree may be proper. *Boche* v. *State*, 84 Neb. 845; *Haddix* v. *State*, 76 Neb. 369; *Davis* v. *State*, 51 Neb. 301, 321. The governing rule is simply stated—if the permissible inferences warrant, lesser degrees go to the jury, otherwise not. *Davis* v. *State*, 116 Neb. 90; *Denison* v. *State*, 117 Neb. 601. But application of the rule to a particular case is difficult. Cf. *Kraus* v. *State*, 102 Neb. 690; *Bourne* v. *State*, 116 Neb. 141. Indeed, application of the rule is judicially recognized to be so difficult that "when a defendant pleads guilty to an information charging murder in the first degree, he is not required, nor even allowed, himself, to determine the degree of the crime, since under such an information he might be convicted of murder of either degree or of manslaughter." *In Re Application of Cole*, 103 Neb. 802, 805. In this case particularly, it would have been difficult on the face of the complicated statutory definitions to work out lesser degrees of homicide. Henry Hawk was not qualified for the undertaking. And, apparently public counsel who had the qualifications, had not the time. Observe that Taylor, who did the shooting, is serving for the same crime a conviction for *second degree* murder (T. 161). The

point is not unimportant. Cf. *Tompkins* v. *Missouri*, 323 U. S. 485, 488; *Williams* v. *Kaiser*, 323 U. S. 471, 474.

Preparation on the law relating to the use of impeachment testimony and the testimony of an accomplice was vital. The pertinence of such questions could have been forecast from a study of the preliminary hearing. Yet again there was no time.

Public counsel off to a precarious start never got a chance to recover balance. The proceedings pressed on relentlessly from arraignment to sentencing in four consecutive days of hearings.

Public counsel did object to the impeachment of De Santi. His objection was overruled, and probably correctly so for De Santi may have been a surprise to the State. De Santi had departed from his rather unimportant testimony at the preliminary hearing (R. 6; T. 85 ff.). See *Cornell* v. *State*, 138 Neb. 708, reh. 139 Neb. 878. But Taylor, whose statements had great significance, did not depart from his testimony at the preliminary hearing. At preliminary hearing and at trial, called both times by the State, he flatly denied that Henry Hawk was in on the crime. He was no surprise to the State.[13] In the absence of surprise, the State was not entitled to impeach him. *Cornell* v. *State*, *supra*. The State did impeach him with

---

[13] Respondent says:

"• • • Taylor • • • at the preliminary hearing, testified that petitioner was an accomplice in the perpetration of the crime, but changed his story at the time of the trial after he himself had pled guilty to being an accomplice and was serving his sentence in the Nebraska State Penitentiary." (Respondent's "Brief in Resistance" pp. 15-16.)

In fact, there can be no question that Taylor told the same story, exonerating Hawk, at both preliminary hearing and trial; and, further, it appears that Taylor had pled guilty and was serving time prior to both preliminary hearing and trial (P. H. 24; and transcript references in the text). We do not charge intentional deception in these errors. But we do believe that they are symptomatic of something else. See p. 53, *infra*.

contradictory statements made to the police which did implicate Henry Hawk. And to this, public counsel made no objection.[14] (R. 7-8; P.H. 24-47; T. 136 ff.; 152 ff.) Nor did he, in his helpless state, request or get a caution to the jury that statements made out of court by Taylor were not evidence of petitioner's guilt or innocence. To that the defense was entitled. *Koch* v. *State*, 130 Neb. 119; *Cornell* v. *State, supra.*

Nowicki's was the only testimony given at the trial which implicated petitioner. Nowicki was an accomplice. His testimony so set raised a host of involved questions for close study of facts and law. If his evidence was uncorroborated, and if he swore falsely in regard to a material matter, or in the alternative perhaps, if his testimony was unreliable because of inherent incredibility or hope of lessened punishment, then defendant might have been entitled to a directed verdict of acquittal. *Jahnke* v. *State*, 68 Neb. 154; 181; *Ruzicka* v. *State*, 137 Neb. 473; *Millslagle* v. *State*, 137 Neb. 664, 138 id. 778. Nowicki's testimony was uncorroborated in any substantial sense. It was flatly contradicted by Taylor, the only other witness who did testify on the question of petitioner's collaboration, if any. Admittedly, though, the precise coverage of the word "corroboration" in Nebraska criminal law is difficult to ascertain. Cf. *Dyson* v. *State*, 107 Neb. 774; *Cockeram* v. *State*, 121 Neb. 757; *Barnes* v. *State*, 124 Neb. 826; *Lovejoy* v. *State*, 130 Neb. 154. There was an innocent nonchalance about Nowicki's testimony that might have been considered inherently incredible. According to himself, he goes out and buys a gun as a courtesy—nothing more—for two felons

[14] Had the State been surprised, it might still have been a question within the trial court's discretion whether to permit use for impeachment purposes of the highly prejudicial prior statements attributed to Taylor. *Cornell* v. *State, supra, semble.* Public counsel, with no time for preparation, would have been in no position to seek out the answer.

to use in an undisclosed "play". He agrees to drive the car and still does not know the project. He does not know whose car it is. (T. 110-111; 129). He was almost certainly lying. Taylor had stated it was Nowicki's car, and on that point Taylor had no reason to falsify. (T. 155). In the hope of lessening his own punishment, Nowicki had every reason to minimize his own participation and draw in Henry Hawk to aid the prosecution. It may be that petitioner was entitled to a directed verdict of acquittal. But study means time. Public counsel could not cope with these questions. No directed verdict of acquittal was requested.

The case went to the jury. If the defense had had the effective assistance of counsel, the case before the jury on petitioner's culpability would have consisted at worst of the word of an impeached felon, Taylor, that Hawk did not participate, against the word of another impeached felon, Nowicki, that Hawk did. For a jury to find guilt beyond a reasonable doubt on that choice would have been difficult. But that is not the case that went to the jury. Public counsel failed to request an instruction limiting impeaching evidence to impeachment. The defense had a right to it. *Cornell* v. *State*, *supra*. With that right lost in the shuffle, the case before the jury became the word of Nowicki which seemed to check, so far as Hawk's participation was concerned, with the statement of Taylor made out of court.[15]

If not entitled to a directed verdict, the defense was entitled to an instruction guiding the jury's consideration of Nowicki's testimony. Had he had the time to search it out, public counsel would have learned that the decisions of the Supreme Court of Nebraska give an accused the right to an instruction noting the weakness of an accomplice's testimony and advising treatment of such testi-

[15] "Left without the aid of counsel he may be . . . convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible". *Powell* v. *Alabama*, 287 U. S. 45, 69.

mony "with great care and caution". *Goemann* v. *State*, 94 Neb. 582; *Dyson* v. *State*, 107 Neb. 774; *Neiden* v. *State*, 120 Neb. 619; and see *Millslagle* v. *State*, *supra*; *Holmgren* v. *United States*, 217 U. S. 509.

These matters are the very weft of a criminal case, at least, where as here, the case for the State was weak. Cf. *Glasser* v. *United States*, 315 U. S. 60, 67. The trial court had no clear duty *sua sponte* to charge on impeachment and accomplices.[16] No such instructions being requested, he gave none (R. 20).

On the day the jury returned its verdict of guilty, the defense filed its motion for a new trial (R. 27). Understandably, defense counsel was still reeling. The motion set forth, practically *in haec verba*, most of the grounds for a new trial as set forth in the statutes. Comp. Stats. Neb. (1929) Sec. 29-2101. A half-page long (Cf. *Luster* v. *State*, 142 Neb. 253), it failed to submit the affidavits required by statute. Id. Sec. 29-2102. The next day the motion was denied and petitioner was sentenced to life imprisonment four days after being brought into the state (R. 27). He proceeded to appeal without counsel.

That is the "totality of facts".

There can be no question of petitioner's right under the Fourteenth Amendment to an effective appointment of counsel, either by way of operation of the public defender statutes or by appointment of the trial court. *Powell* v. *Alabama*, 287 U. S. 45; *Smith* v. *O'Grady*, 312 U. S. 329; *Holiday* v. *Johnston*, 313 U. S. 342; *Tompkins* v. *Missouri*, 323 U. S. 485; *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, 324 U. S. 786; 65 Sup. Ct. 989; *White* v. *Ragen*, 324 U. S. 760; 65 Sup. Ct. 978; *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th); see *Adams* v. *U. S. ex rel. McCann*, 317 U. S.

---

[16] Cf. *Neiden* v. *State*, 120 Neb. 619; and *Lovejoy* v. *State*, 130 Neb. 154 with *Cornell* v. *State*, 138 Neb. 708; 139 id. 878; *Koch* v. *State*, 130 Neb. 119; and *Marshall* v. *State*, 116 Neb. 45.

269. Nor do we understand that that there is any attempt to raise such an issue.

The question here is simply whether petitioner was hurried to conviction with such expedition that there was no effective appointment of counsel. The answer is, in our view, simply, "Yes! he was."

We deal here with the very core of due process—the opportunity to be heard. *Powell* v. *Alabama*, 287 U. S. 45, 68 ff.; *Palko* v. *Connecticut*, 302 U. S. 319, 327; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. Petitioner, unable to defend himself, had no opportunity to be heard when before trial he had no counsel at all to prepare his defense. *Powell* v. *Alabama, supra; White* v. *Ragen, supra; House* v. *Mayo*, 324 U. S. 42; see *Adams* v. *U. S. ex rel. McCann, supra*, at p. 279.[17] Nor was the opportunity to be heard provided when petitioner got counsel in the commencement of a trial that continued on without a gap to provide the bare opportunity for a late attempt at preparation. *Powell* v. *Alabama, supra; Cooke* v. *United States*, 267 U. S. 517; *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335 (C. C. A. 6th); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.).[18] When counsel, like petitioner, was "precipitated" into a proceeding of "breathless speed" which made the trial a "swift, reckless pretense", there was no opportunity to be heard. See

[17] This common sense approach to common-decency has been widely adopted in various courts. See, for examples, *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335 (C. C. A. 6th); *Potter* v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th); *Azzolin* v. *United States*, 2 F. (2d) 15 (C. C. A. 8th); *Louie Yung* v. *Colman*, 5 F. Supp. 702 (S. D. Idaho); *Batchelor* v. *State*, 189 Ind. 69; *Commonwealth* v. *O'Keefe*, 298 Pa. 169; and see the old case of *The People ex rel. Burgess* agt. *Risley*, 66 How. Pr. (N. Y.) 67, 69 (1883) in which the court faced with this problem under the state's constitution took the same view of pre-trial assistance of counsel and stated simply: "This construction is demanded by every consideration of humanity and the enlightened views of personal rights resulting from Christian civilization."

[18] Cf. *Glasser* v. *United States*, 315 U. S. 60; and see, too, *Smith* v. *State*, 123 Neb. 17, 19; *Cooper* v. *State*, 120 Neb. 598, 600.

Powell v. *Alabama*, *supra* at p. 58; *Robinson* v. *Johnston*, 50 F. Supp. 774, 776 (N. D. Cal.); *Ex Parte Sharp*, *supra* at p. 466.

The case here is remarkably like the *Powell* case. Admittedly, that case has the more pungent atmosphere of an interracial conflict. However, the two cases are almost identical in their essentials and in their details. There the defendants were "hauled back and forth under guard of soldiers." Here petitioner was hauled back and forth under guard of federal officers. There defendants charged with a capital offense were "put in jeopardy of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." Not quite so in this case. Here petitioner, charged with a capital offense, was already in jeopardy for his life when counsel for the first time charged with any degree of responsibility began to represent him. There; "during perhaps the most critical period of the proceedings * * * from * * * arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." So, too, here except that the period in *Powell* was six days, and here trial followed immediately upon arraignment with less than one day separating petitioner's arrival in Nebraska from his arraignment.[19]

---

[19] The *Powell* case reversed convictions. No appeal from petitioner's conviction was ever perfected. The difference is immaterial for it is well settled that in this type of case the taking of an appeal is not a prerequisite to release on *habeas corpus*. *Hans Nielsen, Petitioner*, 131 U. S. 176; *Johnson* v. *Zerbst*, 304 U. S. 458, 467; *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser*, 323 U. S. 471, 477. Indeed, apart from the foregoing authorities, to hold otherwise would pile injustice upon injustice. See Point B I *infra* p. 46; *Williams* v. *Kaiser*; and *Johnson* v. *Zerbst*; both *supra*.

On the negative side, apart from petitioner's proceedings, the diligence of counsel has unearthed no reported authority which sanctions what happened here, and which still stands unreversed and unrepudiated.[20]

The decision of the court below stands alone unsupported by authority, and we believe, reason or conscience. The Supreme Court of Nebraska, in accordance with its settled practice in *habeas corpus* cases,[21] passed upon the merits

---

Perhaps, it is unnecessary to remark that *Betts* v. *Brady*, 316 U. S. 455, is not applicable. That decision still marks the limits of the *Powell* case, not on the issue here, but on the right of a defendant to the appointment of counsel. Whatever may be thought of the *Betts* decision (see *Williams* v. *Kaiser*, No. 102, Oct. Term 1944, Brief for Petitioner, pp. 20-43, and authorities and comments therein cited), it is not involved in this case. With the right to public counsel apparent and not in issue, the question here relates solely to deprivation of the effective assistance of counsel. If *Betts* were a case in our field of discussion, it would still be inapposite. There the crime was not a capital one; the state law required no appointment of counsel; a jury was waived and the trial court was enabled to enforce fairness; the case was deemed simple and the defendant deemed on the record able to defend himself. Those are the facts of the *Betts* case as recounted in the majority opinion of the Court. Here the charge was a capital one; the state law required public counsel to act; there was a jury and the trial court did not enforce fairness (p. 32, *supra*); the case was not simple and neither petitioner nor his counsel was able to defend petitioner (pp. 25-32, *supra*).

[20] The Court of Appeals for the District of Columbia by a two to one majority found no violation of due process in a case in which counsel was appointed on the day of trial of a robbery charge. Counsel, so appointed, knew something about the proceeding because of his previous handling (on retainer) of reduction of bail; was assisted by counsel for co-defendants who had adequate time for preparation; and was found to have done all that could have been done in protection of the interests of the accused. *Neufield* v. *United States*, 118 F. (2d) 375, cert. den. 315 U. S. 798. But the writer of a later Court of Appeals opinion has since recognized that the *Neufield* case, which does not approach the grimness of the matter here, was wrongly decided. *Edwards* v. *United States*, 139 F. (2d) 365, 367, cert. den. 312 U. S. 769.

[21] *Habeas corpus* is the proper remedy in Nebraska for assertion of violation of constitutional rights particularly pertaining to deprivation of counsel, *Davis* v. *O'Grady*, 137 Neb. 708, cert. den. 311 U. S. 682; *Alexander* v. *O'Grady*, id. 645, cert. den. 311 U. S. 682; *In Re Application of Carper; Tesar* v. *Bowley*, 144 Neb. 623; see *In Re Application of Tail, Tail* v. *Olson*, 144 Neb. 820; and for the assertion of violation of constitu-

of the matter and rejected petitioner's contention. The court reasoned (R. 51):

> "Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—'should not be tolerated.' *Hubbard* v. *State*, 65 Neb. 805." [22]

The facts of *Hubbard* v. *State* are rather interesting and should be noted. They are set forth in the margin.[23]

If petitioner made any attempt at "procrastination", it occurreed at the time of his arraignment on the morning following the day that he was brought to Omaha from the federal penitentiary at Leavenworth. Admittedly, he did request at least twenty-four hours in which to consult counsel, examine the charge, subpoena witnesses and prepare a defense (R. 18, 4), and in desperation, perhaps to secure counsel if possible, for public counsel had washed their hands of the case the night before (R. 12, 4). Admittedly, that modest demand, made without counsel to advise him,

---

tional rights in general, *In Re Havlik*, 45 Neb. 747 (commitment without authority of law); *Michaelson* v. *Beemer*, 72 id. 761 (lack of jury trial); *In re Resler*, 115 id. 335 (double jeopardy); *Kuwitzky* v. *O'Grady*, 135 id. 466 (no statute authorizing sentence imposed); see *In Re Betts*, 36 id. 282; *In Re Application of Maher*, *North* v. *Dorrance*, 144 id. 484; *Smith* v. *O'Grady*, 312 U. S. 329, 332.

[22] The court also complained of the assumed failure of petitioner to set forth facts to establish his innocence which he was prevented from establishing at the trial. As to this complaint, we have in the text already discussed its lack of basis in fact and law. Please see pp. 26 ff. *supra*.

[23] *Hubbard* v. *State* affirmed a conviction for rape. The point disposed of was not one involving a right to the effective assistance of counsel, but the correctness of a trial ruling denying a continuance. Hubbard, bound over after a preliminary hearing, was released on his recognizance. He fled from Nebraska. There was strong evidence of his guilt including his own admissions. He tried to suppress and stifle the prosecution. Denial of a continuance requested for obtaining witnesses was affirmed with the statement: "Instead of pursuing witnesses, he was fleeing from justice." *Hubbard* v. *State*, at p. 806. With that decision, we have no quarrel.

was unnecessary; for it has been repeatedly held that, even in the absence of a request, it is the duty of a trial court to protect the constitutional rights to counsel of an accused, situated as was petitioner here.[24] But, obviously, petitioner's case under the Fourteenth Amendment is not vitiated because he called the trial court's attention to its duty under the Fourteenth Amendment. Petitioner's complaint is not merely that he was denied a continuance of at least twenty-four hours. That item in the totality of facts adds little weight to the mass which bore him down. Petitioner's complaint is fundamental, invoking the protection of our Constitution. He claims that in the whole process he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244; cf. *Brown* v. *Mississippi*, 297 U. S. 278, 286; *House* v. *Mayo*, 324 U. S. 42; *White* v. *Ragen*, 324 U. S. 760, 65 Supt. Ct. 978; *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335, 337 (C. C. A. 6th).

It is no answer to that basic claim to observe, as did the court below (R. 51), that a period of "over a month" intervened between preliminary hearing and trial. If the question had been whether there was adequate opportunity to procure counsel, it would have been pertinent to observe further that: (1) petitioner was in jail throughout that period and in custody at all times throughout his trial; (2) it is of the very essence of jail that it deprives one of liberty of action; and this has been widely recognized in decisions

---

[24] *Tompkins* v. *Missouri*, at p. 487; *Glasser* v. *United States*, at p. 71; *Johnson* v. *Zerbst*, at p. 465; *Powell* v. *Alabama*, at p. 71; all *supra*; *Voight* v. *Webb*, 47 F. Supp. 743 (E. D. Wash.); *Batchelor* v. *State*, 189 Ind. 69; see *Cooke* v. *Swope*, 109 F. (2d) 955 (C. C. A. 9th); cf. *Brown* v. *Mississippi*, 297 U. S. 278, 287. Perhaps the best exploration of the considerations that enjoin upon a trial court the duty of protecting the constitutional rights of a defenseless prisoner is that of the Court of Appeals for the District of Columbia in *Boykin* v. *Huff*, 121 F. (2d) 865, 870.

pertinent to the hypothetical question under discussion;[25] (3) the jail here was not in Omaha, Nebraska, where the crime and trial occurred but at Leavenworth, Kansas;[26] (4) the relevant period would be the interval between arraignment and trial;[27] and (5) here there was no such interval—trial followed immediately upon arraignment.

But, fundamentally, the question before the Court is not one of lack of time to procure counsel. To an accused unable in ignorance and poverty to defend himself or to pay another to do it for him, it is no matter that he has "over a month" to do either. *Johnson* v. *Zerbst*, 304 U. S. 458 (two months held irrelevant). The impossible task of Sisyphus gets no lighter through eternity. Regrettably, the search for significance in an irrelevant unit of time ("over a month") obscured the reality of a man defenseless in the face of death.

Finally, there remains to be noted only the simple fact that petitioner's case, in its essentials, rests squarely upon the official record of the proceedings that sent him to prison

---

[25] See *Stagemeyer* v. *State*, 133 Neb. 9; *Batchelor* v. *State*, 189 Ind. 69, 78; *Boykin* v. *Huff*, 121 F. (2d) 865, 870 (App. D. C.); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.); cf. *Ex Parte Hull*, 312 U. S. 546; *Tompkins* v. *Missouri*, 323 U. S. 485, 487; *Beebe* v. *Sanford*, 138 F. (2d) 412 (C. C. A. 5th); *United States* v. *Masaaki Kuwabara*, 56 F. Supp. 716 (N. D. Cal.).

[26] Cf. *Johnson* v. *Zerbst*, 304 U. S. 458; *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Robinson* v. *Johnston*, 50 F. Supp. 774 (N. D. Cal.).

[27] This would be plain in any case where, as in this case, the defendant's first knowledge of the contents of an information is derived from a reading at arraignment; and particularly so, here, for it is held in Nebraska that a criminal prosecution does not begin until the proper filing of an information, *State* v. *Robertson*, 55 Neb. 41; cf. *Gilmore* v. *United States*, 129 F. (2d) 199, 203 (C. C. A. 10th), cert. den. 317 U. S. 631. As valuated by the Court in the *Powell* opinion at p. 56: "perhaps, the most critical period of the proceedings [is] from * * * arraignment until the beginning of * * * trial." See in accord on that point, *Eyer* v. *Brady*, 128 F. (2d) 1012 (C. C. A. 4th), cert. den. 317 U. S. 679.

for life. This is not a case in which allegations taxing credulity must be heard to insure at all costs the protection of the Constitution should those allegations peradventure prove true. Cf. *Waley* v. *Johnston*, 316 U. S. 101, 104; *Walker* v. *Johnston*, 312 U. S. 275, 287. Nor is this a case which depends on the required assumption that allegations are true in the absence of a warden's return or contradiction by the official record. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 474; *Tompkins* v. *Missouri*, 323 U. S. 485, 486; *House* v. *Mayo*, 324 U. S. 42, 45. Petitioner's allegations heighten or depress the color of the case a bit at immaterial points. But the official transcript of proceedings, attached to his petition, alone fully proves his case. It shows the complicated nature, the too quick timing, and the too short duration of the proceedings. It shows that petitioner, poor and ignorant, got counsel after trial for a capital offense had begun. It shows the futility of the hurried effort at defense that followed. So much, proven by the transcript, should suffice in the light of the controlling authorities cited.[28] If this be true, we respectfully request the Court to say so.[29]

In conclusion, we repeat that there is no reason to depart from the favorable view of the merits of petitioner's contention indicated by the Court in *Ex Parte Hawk*, 321 U. S. 114. The pertinent authorities and every consideration of "essential fairness" (*Adams* v. *U. S. ex Rel. McCann*, 317 U. S. 269, 279) inherent in the "fundamental principles of liberty and justice" (*Lyons* v. *Oklahoma*, 322 U. S. 596, 601) require the affording of a hearing to petitioner in proof of the fact that he was hurried to conviction in a capital case with such expedition as to deprive him of the effective assistance of counsel.

---

[28] As we read the opinions of the Court, probably less would do.

[29] Please see p. 54, *infra*.

II. *Petitioner is Entitled to be Heard upon his Allegations that his Conviction was Obtained by Perjured Testimony Knowingly Used by the Prosecution.*

Here, again, there is no reason for the Court to depart from *Ex Parte Hawk*, 321 U. S. 114.[30]

Petitioner's claim of a hurried conviction without the effective assistance of counsel rests, as we have seen, essentially upon the record of his conviction—the official transcript of proceedings. But his claim of perjury necessarily rests upon his personal allegations for the official record manifestly could not controvert or prove the charge. See *Pyle* v. *Kansas*, 317 U. S. 213, 215. And petitioner's allegations are not stated with desirable precision and clarity. They are about what could be expected of a layman and pauper unskilled in the law who draws his petition behind prison walls.[31]

Yet he does flatly allege that "your Petitioner's Trial and Conviction was (sic) obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" (R. 15). Ungrammatical as they may be, those allegations do state plainly the ultimate facts of a violation in this respect of the due process clause. *Mooney* v. *Holohan*, 294 U. S. 103, 112; *Pyle* v. *Kansas*, 317 U. S. 213, 215-216; *Lutz* v. *Ragen*, 324 U. S. 760, 65 Sup. Ct. 978, 980. No more than that is required.

---

[30] Discussing petitioner's allegations there which were in substance those made here, the Court in *Ex Parte Hawk* stated its inability to say that petitioner is not entitled to a hearing in proof of his perjury contention.

[31] "The petition is not drawn with desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course, we would compound the injury caused by the original denial of counsel." *Tompkins* v. *Missouri*, 323 U. S. 485, 487; and see, too, *Rogers* v. *Alabama*, 192 U. S. 226; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Cochran* v. *Kansas*, 316 U. S. 255, 258; *Pyle* v. *Kansas*, 317 U. S. 213, 215; *Rice* v. *Olsen*, 324 U. S. 786, 65 Sup. Ct. 989, 992.

There is nothing peculiar about a petition for *habeas corpus* requiring a departure from the general rule that ultimate fact and not evidence is pleaded. This is particularly so since there is available to any court the familiar recourse of a rule to show cause before issuance of a writ.

The Court has repeatedly deemed allegation of the ultimate facts in a petition for *habeas corpus* sufficient for a *prima facie* showing of due process violation necessitating a hearing in proof. See *Pyle* v. *Kansas*, 317 U. S. 213, 215 (perjury allegations stated in terms substantially identical to petitioner's allegations found sufficient); and *Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485; in both of which cases statements in petitions for *habeas corpus* of the ultimate facts as to deprivation of counsel were found sufficient. *Walker* v. *Johnston*, 312 U. S. 275, 286, drives the point home. In that case apparently a petition alleging evidentiary facts was found sufficient because those allegations if proven "would support" a finding of ultimate facts concerning an unconstitutional denial of counsel.[32]

On the foregoing authorities, petitioner's allegations of conviction by the knowing use of perjured testimony are sufficient.

However, petitioner, although not required to do so, does allege in supporting detail perjured testimony knowingly used by the prosecution in obtaining his conviction.

---

[32] To be sure in a case such as *Cochran* v. *Kansas*, *supra*, where the petition gives evidentiary detail or supporting affidavits the Court has noted the fact. But evidentiary detail and supporting affidavits have not been made requirements. To the contrary, it is settled that the uncontradicted allegations of a petition are taken as true for the purpose of determining whether they state a *prima facie* case for hearing. *Cochran* v. *Kansas*; *Williams* v. *Kaiser*; *Tompkins* v. *Missouri*; all *supra*; *House* v. *Mayo*, 324 U. S. 42, 45. For the sake of completeness, we note that the two affidavits mentioned in the Court's opinion in *Cochran* v. *Kansas* boil down essentially to what Cochran told his fellow prisoners. See the Record at pp. 17-18 in No. 510, Oct. Term 1942.

He charges that the testimony of Nowicki, the accomplice, implicating him in the crime, was perjury obtained by bribery (R. 7). And he offers, in at least partial support of that allegation, evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska (R. 7).

Fairly interpreted, he charges too that Taylor, the man who killed Perelman, committed perjury in his sworn, prior statement implicating petitioner which was given to the prosecution. He says specifically, too, that Taylor "was threatened and told by the prosecuting officials he would never live to get out of the penitentiary if he didn't take the stand and swear that Henry Hawk shot Isadore Perelman." (R. 7-8) Respondent's counsel does not meet these allegations by urging that Taylor testified in petitioner's favor. So Taylor did; but his prior sworn statement implicating petitioner and claimed to be perjured went to the jury as substantive evidence with the knowledge of the prosecution. Here the layman's crude sense of "what hit him" is better than lawyer's refinement. If we regard substance rather than form, petitioner's allegations as to Taylor are relevant to his contention of perjury. *Cf. Brown* v. *Mississippi*, 297 U. S. 278, 286.[33]

Finally, it will not be amiss at the hearing in proof of petitioner's perjury contention to clear up the tantalizing mystery of the two doctors. It needs investigation. Petitioner alleges that Dr. McCleneghan committed perjury (R. 5). McCleneghan's testimony at the trial was essential to conviction. The coroner's county physician, he testified that a bullet removed by him from the body of the deceased at the morgue and personally marked "S" by him caused Perelman's death. (Other witnesses traced bullet "S" to the De Santi-Nowicki-Taylor gun.) Petitioner in this con-

[1] Those allegations give some point to petitioner's charge (R. 15) that the trial court also knew of the use of perjured testimony.

nection alleges that bullet "S" was removed and marked by a Dr. C. J. Toohey, physician at Lord Lister Hospital, before the death of Perelman; and that Dr. Toohey so testified at the preliminary hearing. True, the transcript of the preliminary hearing fails to include any testimony by Dr. Toohey (P. H. "Index"). Yet without such a witness there was no evidence of a death at a hearing upon a charge of murder. It is difficult to believe that experienced prosecuting officials could have been guilty of so fatal an omission. Dr. C. J. Toohey exists (R. 18). His name with his address at Lord Lister Hospital was endorsed upon the information by the prosecuting attorney as a witness for the State.

Petitioner alleges the ultimate facts governing his perjury contention. He gives, too, extensive supporting detail.[34] So much, certainly, is sufficient to entitle him to be heard in proof of his allegations.[35]

The court below (R. 49) rejected the perjury contention on the merits. However, it added that if petitioner's allegations showed him to be "wrongfully convicted" his remedy would not be *habeas corpus* but *coram nobis*. The court reasoned (R. 49-50):

> "The writ of error *coram nobis* has been recognized in this state. Carlsen v. State, *supra*. The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack

[34] In his ignorance, petitioner mixes his perjury allegations with extraneous matters such as the lack of corroboration of Nowicki's testimony and the impeachment of Taylor. These have some relevance to other branches of his case. Of course, the addition of this material does not subtract from the allegations petitioner does make concerning the knowing use of perjury to convict him. Cf. *Rogers* v. *Alabama*, 192 U. S. 226.

[35] If this were not so, it would still be enough that the nature of his claim is clear. Even if the petition were insufficient in substance it could be amended in the interest of justice. *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Rice* v. *Olsen*, 324 U. S. 786, 65 Sup. Ct. 989, 992; *Tompkins* v. *Missouri*, 323 U. S. 485, 487.

> of reasonable diligence on his part, which, if known at the time of the trial would have resulted in a different judgment. As stated in Carlsen v. State, *supra*: '* * * the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. * * * Habeas corpus is not a proper remedy to release one from prison who has been wrongfully convicted.' "

But this in its complete misconception of the nature of petitioner's contention presents no adequate, alternative state ground of disposition. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 477-8; *Rogers* v. *Alabama*, 192 U. S. 226, 230; *Bryant* v. *Zimmerman*, 278 U. S. 63, 67. The Attorney General of Nebraska rightly did not claim that it does. Respondent's "Brief in Resistance," pp. 12-16. Petitioner complains not of an error of fact at the trial to be corrected by newly-discovered evidence. He alleges a violation of the Constitution because state officials knowingly used perjured testimony to convict him. By a well-settled line of decisions of the Supreme Court of Nebraska (see p. 35, fn. 21, *supra*), *habeas corpus* is available to review a conviction obtained in violation of the Constitution. It is noteworthy in this connection that the court below, misconceiving the point, does not refer to that line of its own decisions but does refer to *Carlsen* v. *State*, 129 Neb. 84, which did involve an error of fact rather than a charge of due process violation. In the circumstances, we submit that the only adequate ground of disposition by the court below was its disposition on the merits of the constitutional contention as to perjury; and that, hence, petitioner is entitled to a reversal and hearing on his perjury allegations.

Moreover, the writ of *coram nobis* is not available to petitioner. There is no issue as to that. The Attorney

General of Nebraska agrees (Respondent's Brief in the court below, p. 38). Through no fault of his own,[36] he is barred by statutes of limitation from pursuing that recondite remedy.[37] *Newcomb* v. *State*, 129 Neb. 69; Comp. Stats. Neb. (1929) Sec. 20-2008; Rev. Stats. Neb. (1943) Sec. 25-2008. The Court, therefore, should not assume that he is also barred from *habeas corpus*, for if that be true the State of Nebraska "provides no judicial remedy whatever for petitioner". See *Smith* v. *O'Grady*, 312 U. S. 329, 332; *Rice* v. *Olson*, 324 U. S. 786, 65 Sup. Ct. 989, 992; *Mooney* v. *Holohan*, 294 U. S. 103, 113. In the *Smith* and *Rice* cases, the Court twice refused to agree with the contention that *habeas corpus* is not available in Nebraska for this or that particular violation of the Constitution. In our view, this case provides an appropriate third occasion.

---

[36] See the authorities cited at p. 34, fn. 19, *supra*, and *Potter* v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th); *Boyd* v. *O'Grady*, 121 F. (2d) 146 (C. C. A. 8th).

[37] In modern times, the common-law writ of *coram nobis* is an elusive thing beyond the reach of a layman, and indeed beyond the sure grasp of many skilled in the law. Contrast the opinion below (R. 49) and the thoroughgoing discussion of *coram nobis* in *Carlsen* v. *State*, 129 Neb. 84, to the thoroughgoing discussion of *coram nobis* in *Jones* v. *Commonwealth*, 269 Ky. 779. The authors of the Nebraska opinions admit uncertainty as to the exact limits of *coram nobis* but are fairly satisfied that it covers newly-discovered evidence. The authors of the Kentucky opinion likewise admit uncertainty as to exact limits of coverage but are fairly satisfied that it does not cover newly-discovered evidence.

The *Carlsen* opinion, upon which the court below relied, preceded by one day the enactment of a statute which appears to abolish *coram nobis* in Nebraska. That enactment was not noted by the court below. It is at least doubtful that upon a complete consideration *coram nobis* would be found to exist in Nebraska. In any event, if it exists at all it is not available to petitioner. For a discussion of the problem, not pertinent here, of the existence of *coram nobis* in Nebraska see Note, 19 Neb. Law Bull. 159.

B. PETITIONER IS ENTITLED TO A HEARING UPON HIS ALLEGATIONS THAT IN HIS TRIAL AND CONVICTION HE WAS DENIED EQUAL PROTECTION OF THE LAWS OF NEBRASKA.

We have urged in Part A, *supra*, the affording of a hearing to petitioner because he has sufficiently alleged *prima facie* violation of the due process clause in two separate respects: first (pp. 22 to 39, *supra*) he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel; and second (pp. 40 to 45, *supra*) his conviction was obtained by the use of evidence known by the prosecution to be perjured.

We urge now in Part B the affording of a hearing to petitioner because he was denied equal protection of the laws in two separate respects: first (Point I, *infra*) he was deprived of the appeal accorded to others by the laws of Nebraska; and second (Point II, *infra*) with regard to the method by which he was brought into the State of Nebraska and imprisoned he was not accorded the same treatment as the law of Nebraska accords to others similarly situated.

1. *Petitioner is Entitled to Be Heard Upon His Allegations that He Was Deprived of the Appeal Accorded to others by the Laws of Nebraska.*

Following conviction for first degree murder, petitioner was deserted by counsel (R. 10). In his own behalf, he filed in the Trial Court a notice of appeal, poverty affidavit and request to proceed as a pauper (R. 10; 29-31). The request was granted. The Trial Court ordered that its Clerk and Stenographic Reporter "respectively prepare and deliver to the defendant a Transcript of Proceedings and a Bill of Exceptions." See the order at R. 30. "But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and

consealed (sic) and never delivered to your Petitioner." See petitioner's allegation at R. 10. Petitioner, on his own, made various moves in the Supreme Court of Nebraska to protect his appeal rights. These were apparently misguided and, in any event, were unsuccessful (R. 10). After loss of appeal rights, the Court's Stenographic Reporter advised that the Bill of Exceptions was in the prosecuting attorney's file (R. 11).

The Court's decision in *Cochran* v. *Kansas*, 316 U. S. 255, governs decision on these facts. Pursuant to *Cochran*, petitioner is entitled to be heard upon this *prima facie* case of denial of equal protection, uncontradicted upon the record here. See, too, *Hysler* v. *Florida*, 315 U. S. 411, 422-3; *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C.); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.); *State* v. *Guerringer*, 265 Mo. 408. It is immaterial, of course, that in the *Cochran* case, state officials at the prison impounded and concealed appeal papers, whereas here state officials at the trial court and office of the prosecuting attorney did the "impounding and consealing (sic)." *Mooney* v. *Holohan*, 294 U. S. 103, 112-3, and decisions of the Court therein cited. Nor, in the light of the *Cochran* case, can it matter that petitioner having alleged that he was "deserted by counsel" (R. 10) failed to allege that "he ever requested [counsel] to appeal"; or that having alleged nondelivery, impoundment, and concealment of his appeal documents "for some reason best known to the Trial Court and Prosecuting Officials" (R. 10), he failed to allege "in what manner they were impounded and concealed" so that the Bill of Exceptions reached the file of the prosecuting attorney. Cf. the opinion of the court below at R. 50.

While the State of Nebraska accords a right of appeal to those convicted of crime, it must accord that right to all, including petitioner. He must not be singled out for invidious treatment by action of Nebraska officials.

In so holding in relation to substantially the same case in Kansas, the *Cochran* decision is but a facet of a many-pointed but continuous mass of constitutional doctrine. Uniform treatment must be accorded to all who are similarly situated—in the administration of the criminal law, *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Moore* v. *Missouri*, 159 U. S. 673, 677-678; *Betts* v. *Brady*, 316 U. S. 450, 463; —in the administration of all justice, civil or criminal, *Ughbanks* v. *Armstrong*, 208 U. S. 481, 487; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Ex Parte Lange*, 18 Wall. 163; *In Re Ah Fong*, Fed. Cas. No. 102 (C. C. D. Cal.)—and finally in the operation of all laws, Amendment XIV to the Constitution.

The injury to petitioner from denial to him of a right of appeal was serious. Query whether there was sufficient evidence to go to the jury. Highly prejudicial statements going to the crux of the case, which were made out of court and not subject to cross-examination, went to the jury in plain error. See the discussion at pp. 29 to 32, *supra*. Almost certainly petitioner's conviction would have been reversed on appeal had an appeal been accorded to him.[38] The loss to petitioner thus far has been eight years of liberty.

The petition here gives the kind of detail that makes a contention highly believable. There is the simple fact of a court order to court officials to prepare appeal documents and deliver to petitioner. There is the further simple allegation that the appeal documents prepared by court officials were never delivered to petitioner. And, finally, some of the documents ended up in the wrong file.

Yet less than intentional discrimination against petitioner should suffice in proof of a violation of the Fourteenth

---

[38] Hence it adds little to the hurt resulting from deprivation of an appeal that the Supreme Court of Nebraska has the statutory power to reduce sentence on appeal, and does. See, as examples, *Nelson* v. *State*, 33 Neb. 528 (Life sentence for murder reduced); *Wiedeman* v. *State*, 141 Neb. 597 (Sentence for rape reduced).

Amendment shading off from equal protection into due process. See the opinion of the Court of Appeals for the District of Columbia, per Rutledge J., in *Boykin v. Huff*, 121 F. (2d) 865, 870. Discussing a record which showed that a convicted pauper, jailed and acting without counsel, was misled as to appeal rights by an unintentional omission of the Trial Court to inform him fully, the opinion proceeds:

> "In an entirely negative sense, nothing was done, so far as the record shows, which infringed any right appellant may have had. But to some extent, when the fundamental rights of citizens are at stake, more especially when they are those of indigent persons relating to their lives or personal liberty, there is an affirmative duty, which, however undefined in ultimate scope, requires not only that the court not mislead, but that it positively and fully inform the accused concerning his basic rights. This obligation assumes special authority when he is not represented by counsel and is confined in prison and unable to speak for himself except by mail. Nor is it lessened by conceptions of official propriety which, however sincerely entertained, have the effect, though not intended, of foreclosing fundamental rights. These do not give way to an etiquette appropriate for use in other circumstances. Judicial objectivity may be served by keeping hands off when parties are adequately represented. But that is not true when poor persons have no counsel and the effect of inaction is to commit the preservation of their elemental rights to their own ignorance."

II. *Petitioner is Entitled to Be Heard upon His Allegations That He Was Denied the Equal Protection of the Laws in Being Brought by Nebraska Officials Into Nebraska and Incarcerated Without Regard to the Law of Nebraska.*

At the outset on this branch of the case, we state that we do not urge the granting of a hearing to petitioner because, entirely apart from Nebraska law, he was twice brought

into Nebraska without regard to Article IV Section 2 of the Constitution governing extradition. Petitioner has strongly pressed upon counsel (appointed) to argue that contention; and the contention is not without merit. See the dissenting opinions in *Mahon* v. *Justice*, 127 U. S. 700, 715; *Pettibone* v. *Nichols*, 203 U. S. 192, 217. Yet in fulfilment of our assignment, it has not seemed wise in our judgment to obscure the solid basis in precedent of petitioner's case on four points by attempting an uphill argument on a dubious fifth point in the face of the *Mahon* and *Pettibone* majority opinions.

However the *Mahon* and *Pettibone* opinions both recognize the right of a State to adopt its own rule governing treatment of the prosecution or imprisonment of a person brought into the state without extradition process. *Mahon* v. *Justice, supra*, at p. 715; *Pettibone* v. *Nichols, supra*, at p. 212; *Ker* v. *Illinois*, 119 U. S. 436, 444. Pursuant to its right, the State of Nebraska has seen fit to apply the rule that a person otherwise lawfully imprisoned is entitled to release if brought into the state by agents of the State without extradition process. *In Re Robinson*, 29 Neb. 135; *Kendall* v. *Aleshire*, 28 Neb. 707. That is the law of Nebraska as declared, in the absence of statute, by its Supreme Court in *In Re Robinson*. Pursuant to that law, the Supreme Court of Nebraska in the *Robinson* case granted an original application of *habeas corpus* to one brought by Nebraska agents into Nebraska without extradition and jailed there. That is exactly what petitioner alleges happened to him (R. 12-13).

This contention was urged upon the court below and the case of *In Re Robinson* cited (R. 14). It was met with a statement of the contention and the comment that the contention is "without merit". See the opinion of the court below at R. 47.

We should think it unnecessary to point out that a decision

of the highest court of a State which solemnly declares the law of the State necessarily has been one of general applicability to all within its coverage. Such a decision perforce cannot be and has not been considered a sport in the process of judicial administration. But the law so declared has not been applied to petitioner, although he was so plainly within its coverage. In the interest of space saving, we do not repeat here the settled doctrine of the Court (see pp. 46 to 49, *supra*) which requires that petitioner in this respect, too, be afforded a hearing in proof of his allegations of denial of equal protection.

Conclusion

Counsel does not know whether Henry Hawk was in truth innocent or guilty.[39] True, he has been twice convicted of other offenses against society, the natures of which do not appear. Yet apart from Taylor and Nowicki, only Henry Hawk could know whether he is guilty of the crime for which he was convicted, that is, whether he was or was not with Taylor on the night that Taylor killed. Henry Hawk says he is innocent (R. 12). No other human being could know; or even guess with any confidence. In just appraisal of his trial and the evidence there adduced, an impartial student can say with confidence only that he should have been acquitted. Yet he was condemned without hearing, or without the substance of a hearing, which is the same thing. Beyond this, we suggest that the central iron of due process—"condemn ye not, before ye have heard"—appears to be a restraint upon men that ever sits uneasily. The evidences are on every hand. People in their personal relationships, in their ordered social relationships, hasten almost naturally to condemn without hearing, even to contemn. It is as if the hard yoke of due process forged

[39] Counsel has never met him.

through the centuries by the unremitting toil of the just is corroded daily by the sweat of conflict and prejudice. Probably for reasons such as these, the Court has hewn strictly to the line that the sole question is whether constitutional rights have been preserved. Innocence or guilt is irrelevant. *Moore* v. *Dempsey*, 261 U. S. 86, 87-88; *Glasser* v. *United States*, 315 U. S. 60, 75-76.

So, too, the experience of Nebraska with the petitions of others for *habeas corpus* appears largely not pertinent here. The dissenting Justices in *Rice* v. *Olsen*, 324 U. S. 786, *supra*, because of scanty allegations there, placed some weight on statements of the Attorney General of Nebraska concerning petitions for *habeas corpus* (*Rice* v. *Olsen*, No. 391 Oct. Term 1944, Brief for Respondent, p. 25). In the *Rice* case, the Attorney General claimed: first that there had been many petitions in Nebraska in the later years; we comment that this cuts both ways; second, that many hearings had been granted on those petitions; we note that in years of trying petitioner, here, has yet to obtain a hearing; third, that in the hearings said to have been granted in other cases proof has failed; we recall that here the hurrying to conviction with deprivation of the effective assistance of counsel is apparent on the official record of proceedings without need of further proof; and fourth, the Attorney General said that the many petitions filed had borne the stamp of one author, a prison inmate. If this last be true, surely, the necessity for it can only be regrettable. We will yet reach the time when by statute or constitutional provision imprisoned paupers convicted without counsel need not rely, almost everywhere but in this Court, upon their own meager intellectual resources to obtain complicated things like due process and equal protection of the laws.

Finally, while we proceed with diffidence, we feel that duty calls for discussion of a delicate matter. If lawyers

y be permitted to comment favorably on the work of dicial officers, we do not hesitate to say, on the basis of udy of many Nebraska decisions, that the work of Neaska's courts and its chief law officers achieves a high el of excellence. Yet, somehow, at least in the later ars, there seems to be an atmosphere of inattention enloping matters concerning Henry Hawk. In that atmosere it becomes possible for the State's law officers to say petition here makes "no complaint" that public counsel l not properly represent petitioner "throughout his al" (Respondent's Brief "In Resistance", p. 11). It comes possible, too, to say that Taylor testified against titioner at the preliminary hearing when he did not (id. 15). Likewise, the State district court can find the tition here identical to a very different earlier one (p. 17, *pra*); and the State's law officers, commenting on that ding, can say the district court "apparently investited the records of the district court sufficiently to astain" the correctness of its finding (Brief for Respondt (appellee) below, p. 17). Of Henry Hawk's original tition, the same in substance as his petition here, the ate's law officers could say it involved no "remote deral question" (*Ex Parte Hawk*, — Original, Oct. rm, 1943, Respondent's Brief in Opposition, p. 1). ter the State's law officers can refer many times to the ourt's opinion which did find federal questions in that rlier petition upon which petitioner was probably enled to be heard (*Ex Parte Hawk*, 321 U. S. 114, 115-116); t they can see in that opinion everything but its rtinence to this proceeding (Brief for Respondent ppellee) below, pp. 10, 17, 20, 35, 36). Both courts below n fail to note the court's opinion in *Ex Parte Hawk*. nd both can pass upon and reject the four federal quesons urged here without citation of a single decision of e Court.

Something is wrong. Intentional discrimination is not implied. We suggest rather that what is happening is a natural thing. There have been so many papers pertaining to Hawk (see p. 14, *supra*). Freshness of approach is lost on any succeeding item. Attention is becalmed. It becomes difficult even to recognize plain issues.

In that atmosphere, the implications of *Ex Parte Hawk* were of no avail. In that atmosphere, should the Court find merit in petitioner's case, only a definitive opinion of the Court is likely to avail. The Court's opinion in Ex *Parte Hawk* was handed down almost two years ago. It will be cold comfort for him, if two years from now petitioner reads a favorable opinion of the Court in this case by light that still filters through prison bars; for meanwhile Henry Hawk's life fritters away.

Respectfully submitted,

JOSEPH A. FANELLI,
Counsel for Petitioner.

MILTON KRAMER,
Of Counsel.

September, 1945.